M E M O R A N D U M

To: Members, ATILS Subcommittee on Unauthorized Practice of Law and Artificial Intelligence
From: Randall Difuntorum, ATILS Staff
Date: February 25, 2019
Re: ATILS – OPC Staff Proposal

Synopsis:

Among the materials for the February 28, 2019 ATILS meeting is the February 19, 2019 memorandum addressing standards for certification of technology providers from Dan Rubins and Joshua Walker to the ATILS Subcommittee on Unauthorized Practice of Law and Artificial Intelligence ("UPL/AI Subcommittee"). In reading this memorandum with the background of the many reports and articles in the ATILS dropbox resources, including resources concerning the FDA's process for approving a "medical device," staff is suggesting that ATILS consider the concept of regulatory approval of a "legal advice device."

Background:

Please read this FDA webpage providing a basic explanation of FDA approval of medical devices, this article concerning the FDA's approval of the first autonomous medical device made possible through AI technology, and this article on AI and medical device regulation in the U.S. and other countries. The first item includes the following statement: "The Food and Drug Administration (FDA) assures that patients and health care providers have timely and continued access to safe, effective, and high-quality medical devices." The second item includes this observation: "Autonomous AI systems have massive potential to improve healthcare productivity, lower healthcare costs, and improve accessibility and quality." Taken together these statements are comparable to the State Bar's strategic objective of studying online legal service delivery models to determine if any regulatory changes are needed to better support and regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

If in the medical industry regulatory approval of a "medical device" is an established and evolving policy that can value both safety and innovation, including the approval of autonomous AI devices, then might a similar regulatory approach be viable for the legal services industry?

Discussion:

The thorough and thoughtful February 19, 2019 memorandum covers much territory for a possible regulatory scheme where the focus is placed on the provider. This type of regulatory strategy has precedent in the State Bar's role in certifying a law corporation, a limited liability partnership, a lawyer referral service, and in the accreditation of an organization that grants certificates of legal specialization.[1] However, in the context of technology as a means of providing legal advice directly to a

[1] In California, there is also the licensing of medical device manufactures under the California Department of Health Food and Drug Branch.

consumer, there might be an inherent limitation in this strategy because the State Bar regulator is not directly testing the technology itself to confirm that the output reflects an acceptable level of legal acumen and competence. By shifting the focus to the device itself, the regulatory strategy would more closely approximate the longstanding public protection policy implemented in the licensing of applicants for admission to practice. This is because the State Bar would be testing and approving a device that will be permitted to render legal advice to a consumer. Arguably, there might be greater predictive validity to the testing of a device over the testing of a person because devices can be expected to behave more consistently than people. In addition, direct regulation of the device would likely limit the need to develop regulatory structures to govern entity providers through, for example, potential new ABS, MDP or non-lawyer ownership laws.

What is a "legal advice device?"

This is an obvious first question. To oversimplify, staff's concept is that a "legal advice device" could be defined as any technology that researches and applies law to a person's particular facts and renders a legal opinion on legal question and/or provides a recommendation for action that is legally sound. One example would be a device (e.g., a software application) that answers the question of whether a particular person's estate plan should involve a will, a living trust or some other donative instrument. Another example would be a device that renders a legal opinion on whether circumstances have arisen that support a change in a particular person's current child support entitlement or payment obligations.

What would be the approval process?

Attached is a draft flow-chart of a legal advice device approval process that is intended to spark discussion. In part, this process is derived from the FDA's process for approval of a medical device. This is for illustration purposes only. The key segment of any approval process likely would be the clinical evidence requirement to demonstrate the competence and efficacy of a submitted device's output. The precise standards would need to be developed by an implementation committee but it would likely require establishment of an approval review board or similar body.

Eligibility standards for appointment to the review board could require legal expertise or technology expertise or consumer experience in relevant areas of law where there is great unmet need for legal services. The review board's primary function would be to apply criteria for assessing the legal acumen of a device. For example, in the child support scenario, the approval criteria might provide that the device must render a correct legal opinion, for example, 90% of the time.

One significant difference with the FDA process is the fact that the testing and evaluation of a medical device is dependent on the long time frames needed in the assessment of improvement (or lack thereof) in a test subject's medical condition as well as for the monitoring of side effects that might arise only after passage of time. This would not be true in the testing of a legal advice device as expert reviewers should be able to timely determine whether the legal opinion or recommendation of a device is accurate in a particular test subject's situation.

What happens when a legal advice device is approved?

Once approved, a "legal advice device" would be cleared to be deployed and marketed as the statutory prohibitions on the unauthorized practice of law would be amended to state that the manufacture, sale and use of an approved legal advice device would not constitute the unauthorized practice of law. Similar to the discussion of a standards and certification process in the February 19, 2019 memorandum, this means that there would be a safe-harbor for the persons or entities that use the device to render

legal services to consumers. However, the developer would be subject to post-approval requirements such as mandatory reporting of complaints received from users and other future known issues and material changes in circumstances that impact functionality (such as a major change in the source for feeding data to the device).

In addition, similar to the FDA process, staff's recommendation contemplates that if a legal advice device has a predicate (i.e., a prior iteration of the device, a.k.a., the 1.0 version, that was the subject of original State Bar review and approval), then there would be a streamlined approval process for the version 2.0 and any future refined and upgraded versions of the device. This would encourage a culture of constant improvement for an approved legal advice device.

What about devices that do not render legal advice, such as legal information or scrivener devices?

Staff's suggested concept contemplates a rigorous approval process for a legal advice device but if a device only provides legal information (i.e., a legal information device or a scrivener device), then this approach could establish a separate path that would only involve voluntary registration. By limiting the regulation of information and scrivener devices to registration only, developers would have the greatest freedom to innovate and compete. For example, because the FDA has clarified that typical fitness monitoring devices are not medical devices, Apple and Fitbit have been able to innovate and compete in this market to the benefit of consumers. However, by the same token, manufacturers of heart pacemakers do not enjoy similar minimal regulation because a heart pacemaker is a medical device that requires the full panoply of FDA scrutiny and approval. This same dichotomy of regulation might be a desirable policy in the legal industry's regulation of technology.

Staff's suggested concept also contemplates that if a device will only be marketed to lawyers or law firms to use in representing clients, then the process will be expedited because the lawyers using the device will be directly subject to the duty of competence in rendering services to their clients. This allows manufactures to develop devices that are supportive of the traditional law firm model and this could serve as a good field testing opportunity in anticipation of possible development of a device that would be modified for use outside of a law firm environment.

Can a device approval regulatory approach take account of the nuances involved in rendering legal advice?

This remains to be seen but there appears to be great promise and high expectations for what technology can do in the rendering of legal advice. Staff recommends reading: "The Infinite Legal Acumen of an Artificial Mind: How Machine Learning Can Permanently Capture Legal Expertise and Optimize the Law Firm," by J. Mark Phillips (11 J. Bus. Entrepreneurship & L. 301 (2018)). (Available at: https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1179&context=jbel) An excerpt is provided below.

> IX. ETERNAL LEGAL ACUMEN—A PERMANENT COMPETITIVE ADVANTAGE
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> The aforementioned applications of machine learning to the upper echelons of legal decision-making represent merely a sample of its potential, yet one key implication underlying all such applications is the fact that machine learning platforms permanently capture the hard-earned wisdom of law firm leaders and experts.
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> This point cannot be stressed enough: law firms' reputations are undoubtedly their most valuable asset, and that reputation rests upon the wisdom and expertise of their

> partners. Over time, the composition of a firm's partnership invariably changes, and with it changes the composition of competencies and skill-sets that guide the firm. The traditional apprenticeship law firm model attempts to capture the partners' expertise through the training and tutelage of junior attorneys. This business model is ostensibly designed to continuously preserve senior partners' expertise and transfer that expertise to subsequent generations of attorneys. This model has served the legal profession ably over time, but by any reasonable estimation, the transfer of legal acumen among generations is not clean, linear, or predictable—especially within an individual law firm.
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> Machine learning platforms promise to memorialize the legal decisions of law firm leaders in perpetuity; a platform that continuously learns from their masterstrokes and follies alike, and ultimately produces a reservoir of institutionalized expertise. This cache of wisdom and expertise may eventually provide law firms with a permanently sustainable competitive advantage among peers.
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> This permanent capture of legal wisdom and institutionalization of attorney expertise promises to change the long-standing conception of law firms. Instead of viewing a firm as a temporary clustering of legal minds aligned to serve their current clientele base, firms may start being viewed as the house in which the minds of current and previous famed legal experts live on for time immemorial.

(11 J. Bus. Entrepreneurship & L. at p. 319.)

Conclusion:

The approach of regulating the approval of a legal advice device seems to warrant ATILS consideration. It would appear to be as viable as any of the other potential strategies: defining the practice of law; ABS/MDP; and non-lawyer ownership.

Attachment: Discussion Draft Flow-Chart

"LEGAL ADVICE DEVICE" REGULATION – DISCUSSION DRAFT FLOW CHART